In-Fusion Solutions Sdn Bhd v UNITAR Capital Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-26–01 OF 2014
HASNAH HASHIM J
30 JANUARY 2015

Contract — Agreement — Breach — Parties entered into management agreement of project — Plaintiff appointed as project manager of project — Plaintiff claimed breach of agreement by defendant in taking over management of project without plaintiff's consent — Defendant counterclaimed for breach of agreement by plaintiff in appointing subsidiary company to manage project — Whether plaintiff and defendant committed breach of agreement — Whether plaintiff and defendant entitled to damages

The essence of the present case was on the management of a project known as K-Force project. The main objective of the project was to encourage and also to provide educational advancement for personnel in the navy, army and air force to further their studies to a higher level whilst still in service. For this purpose, Universiti Tun Abdul Razak Sdn Bhd ('UNIRAZAK') which was owned, operated and managed by the defendant had entered into a management agreement in 2003 with the plaintiff ('the first MA') whereby the plaintiff was appointed as project manager. Upon the expiration of the first MA, the plaintiff and UNIRAZAK executed another management agreement on 1 October 2008 ('the second MA) for a further period of two years to continue implementing and managing the K-Force project. The crux of the plaintiff's claim was on the contention that the defendant in breach of the second MA had, without any notice whatsoever and consent of the plaintiff decided to take over the operation of the K-Force project commencing on 1 November 2013 and as a result, the plaintiff and its subsidiary company, Future Learning Corp Sdn Bhd ('FLC') had suffered damages. The defendant counterclaimed against the plaintiff for damages arising out of the breach of the second MA by the plaintiff. The defendant contended that the plaintiff had breached the second MA by appointing FLC to carry out and perform the operations and management of the K-Force project without the defendant's consent. The issue for determination was whether the plaintiff and the defendant had committed a breach of the second MA.

Held, dismissing the plaintiff's claim with costs of RM30,000 and allowing the defendant's counterclaim in part:

(1) It was not stated in the pleadings that defendant had breached the second MA. The parties were bound by their pleadings. The court was not entitled to decide a suit on a matter which was not pleaded and the trial

of the suit was confined to the pleadings filed. Further, based on the documentary and oral evidence, the plaintiff had accepted the decision of the defendant to take over the K-Force programmes. Based on the factual matrix of the case with regards to the agreement, no evidence was adduced by the plaintiff to prove that the defendant had breached the second MA (see paras 34 & 42).

(2) The plaintiff and FLC were two separate entities and based on the terms of the second MA, there was no privity of contract between the defendant and FLC. The second MA was between the plaintiff and the defendant. FLC was clearly not a party to the agreement and thus could not enforce it. The relationship between the plaintiff and the defendant was based on all the said agreements. The parties were therefore bound by the express terms of the said agreements. Therefore, based on the reasons stated above, any claim for damages by FLC pursuant to the second MA would inevitably failed. As for the plaintiff, they failed to adduce sufficient evidence to prove that they had suffered or experienced financial loss (see paras 47–49).

(3) The plaintiff had breached the second MA by appointing FLC without the knowledge and consent of the defendant as required by the terms of the said agreement. However, the defendant was only entitled to an award of nominal damages at RM10,000 for want of proof as they failed to adduce any evidence to quantify it damages (see para 61).

[Bahasa Malaysia summary

Inti pati kes ini adalah atas pengurusan projek yang dikenali sebagai projek K-Force. Objektif utama projek adalah untuk menggalakkan dan juga memberikan kemajuan pendidikan bagi pegawai-pegawai di dalam tentera laut, darat dan udara untuk melanjutkan pelajaran mereka ke peringkat tinggi sementara masih dalam perkhidmatan. Bagi tujuan ini, Universiti Tun Abdul Razak Sdn Bhd ('UNIRAZAK') yang mana dimilik, dikendalikan dan diuruskan oleh defendan telah memasuki perjanjian pengurusan pada tahun 2003 dengan plaintif ('PP pertama') di mana plaintif dilantik sebagai pengurus projek. Atas penamatan PP pertama, plaintif dan UNIRAZAK melaksanakan perjanjian pengurusan satu lagi pada 1 Oktober 2008 ('PP kedua') bagi tempoh lanjut selama dua tahun untuk terus melaksanakan dan mengurus projek K-Force. Teras utama tuntutan plaintif adalah atas hujahan bahawa defendan memungkiri PP kedua telah, tanpa apa-apa notis dan izin plaintif, memutuskan untuk mengambil alih operasi projek K-Force bermula pada 1 November 2013 dan akibatnya, plaintif dan syarikat subsidiarinya, Future Learning Corp Sdn Bhd ('FLC') telah mengalami kerugian. Defendan menuntut balas terhadap plaintif bagi kerugian yang berbangkit daripada pelanggaran PP kedua oleh plaintif. Defendan berhujah bahawa plaintif telah melanggari PP kedua dengan melantik FLC untuk menjalankan dan melaksanakan operasi dan pengurusan projek K-Force tanpa izin defendan. Isu

untuk penentuan adalah sama ada plaintif dan defendan telah melakukan pelanggaran PP kedua tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM30,000 dan membenarkan sebahagian tuntutan balas:

(1) Ia tidak dinyatakan dalam pliding bahawa defendan telah melanggari PP kedua. Pihak-pihak adalah terikat oleh pliding mereka. Mahkamah tidak berhak untuk memutuskan tindakan atas perkara yang tidak diplidkan dan perbiacaraan tindakan adalah terangkum kepada pliding yang difailkan. Selanjutnya, berdasarkan keterangan dokumentar dan lisan, plaintif telah menerima keputusan defendan untuk mengambil alih program K-Force. Berdasarkan atas matriks fakta kes berkenaan perjanjian, tiada keterangan yang dikemukakan oleh plaintif untuk membuktikan bahawa defendan telah melanggari PP kedua tersebut (lihat perenggan 34 & 42).

(2) Plaintif dan FLC adalah dua entiti berasingan dan berdasarkan atas terma PP kedua, tidak terdapat priviti kontrak di antara defendan dan FLC. PP kedua adalah di antara plaintif dan defendan. FLC adalah jelas bukan pihak kepada perjanjian dan oleh itu tidak dapat menguatkuasakannya. Hubungan di antara plaintif dan defendan adalah berdasarkan ke atas kesemua perjanjian tersebut. Pihak-pihak adalah oleh itu terikat oleh terma nyata perjanjian-perjanjian tersebut. Oleh itu, berdasarkan ke atas alasan-alasan yang dinyatakan di atas, apa-apa tuntutan bagi ganti rugi oleh FLC berikutan PP kedua tersebut adalah gagal. Berkenaan dengan plaintif, mereka gagal untuk mengemukakan keterangan yang mencukupi untuk membuktikan yang mereka telah menghadapi atau mengalami kerugian kewangan (lihat perenggan 47–49).

(3) Plaintif telah melanggari PP kedua dengan melantik FLC tanpa pengetahuan dan izin defendan seperti yang dikehendaki oleh terma perjanjian tersebut. Walau bagaimanapun, defendan hanya berhak kepada award ganti rugi sebanyak RM10,000 bagi kemahuan bukti kerana mereka gagal untuk mengemukakan apa-apa keterangan untuk menyatakan kuantiti ganti ruginya (lihat perenggan 61).]

Notes

For cases on breach of agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3278–3286.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22; [1968] 1 LNS 8, FC (refd)

Bank of Credit and Commerce International SA v Munawar Ali [2002] 1 AC 251, HL (refd)

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)
Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284; [2014] 5 CLJ 533, CA (refd)
Glamour Green Sdn Bhd v AmBank Bhd & Anor Appeal [2007] 3 CLJ 413, CA (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243; [1983] 2 CLJ 187; [1983] CLJ (Rep) 186, FC (refd)
Lee Sau Kong v Leow Cheng Chiang [1961] 1 MLJ 17; [1960] 1 LNS 56, CA (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577; [1995] 2 CLJ 23, FC (refd)
Ng Lay Choo Marion v Lok Lai Oi [1995] 3 SLR 221, CA (refd)
Popular Industries Ltd v Eastern Garment Manufacturing Co Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, HC (refd)

C Vilasini (Azahar Azizan Harun with her) (C Vilasini & Assoc) for the appellant.
Natalia Izra Nasaruddin (Shahul Hamid Amirudin and Chen Yu Szen (PIC) with her) (Zul Rafique & Partners) for the respondent.

Hasnah Hashim J:

BACKGROUND FACTS

[1] Sometime in 2003, the plaintiff acquired from its creator, Dr Mohd Salmi bin Mohd Sohod, an educational system comprising of an e-learning platform via hybrid face to face and online as well as a learning management system. For this purpose a learning portal named as K-Force was created. The K-Force project was initiated by the then Minister of Defence, YAB Dato Seri Najib. The K-Force project is a program designed specifically for officers from the Ministry of Defence. The main objective is to encourage and also to provide educational advancement for personnel in the navy, army and air force to further their studies to a higher level whilst still in service.

[2] In 2002, the defendant entered into an agreement with MINDEF in respect of which the defendant agreed to allow MINDEF personnel to further their studies at Universiti Tun Abdul Razak ('UNIRAZAK') in certain fields at learning centers determined by MINDEF.

[3] By a letter issued by UNIRAZAK dated 13 August 2011 (pp 117 and 119 B1) the defendant was notified that with effect from 1 August 2011, UNIRAZAK will be restructured as follows:

(a) UNIRAZAK is a university primarily focused in the areas of innovation, leadership and entrepreneurship. UNIRAZAK is owned by Universiti Tun Abdul Razak Sdn Bhd; and

(b) the University of Management and Technology ('UMTECH') offers programmes in various fields of study. UMTECH is owned, operated and managed by the defendant.

[4] As a consequence of the restructuring, the operation of all the Regional Centers and Learning Centers of UNIRAZAK was transferred to UMTECH together with the corresponding programmes. Subsequently UMTECH changed its name to UNITAR International University with the approval of the Ministry of Education sometime in October 2012.

THE FIRST MANAGEMENT AGREEMENT

[5] Universiti Tun Abdul Razak Sdn Bhd and the plaintiff entered into a management agreement dated 31 December 2003. Pursuant to the said agreement, the plaintiff was appointed as the project manager. Clause 13.1 of the agreement provided that the agreement shall be for a period of two years commencing from the effective date, 1 April 2003.

[6] Under the said agreement, as the project manager, the plaintiff shall provide the services as set out in second schedule of the said agreement:

SECOND SCHEDULE: DETAILS OR SERVICES

Parties: *Universiti Tun Abdul Razak Sdn Bhd (410764-P) and Infusion Solutions Sdn Bhd (601042-X).*

Effective Date: *1st April 2003.*

General: *All capitalized terms herein shall have the respective meanings assigned thereto in the Agreement unless otherwise noted.*

Policies and Procedures: *From time to time Client may develop one or more policies and procedures document(s) that set forth in further detail the agreed upon Services provided under this Agreement.*

Scope of Service:

The Project Manager shall provide the following Services:

Item

1. Overall K-Force Project Management	• *Consult with client to determine the scope, objectives, priorities, policies, procedures, constraints, assumptions and strategies for the K-Force Project.*

		• *Manage the execution of K-Force Project in accordance with the approved planning, procedure and process documents.*
2.	*Student and Customer Relations Management*	• *Provide first level support on queries by Students.* • *Monitor information distribution between Client to Customer and Client to Student.*
3.	*Learning Centre and Facilities Management*	• *Monitor the facilities provided by Customer for Student.* • *Provide, update and replace sufficient reading materials at Learning Centre according to the list provided by UNITAR.*
4.	*K-Force Portal Management*	• *Consult with Client to determine the framework, layout and design of the K-Force Portal.* • *Constantly update portal to include news, announcements and Student updates by Client.*
5.	*Learning Management System Management*	• *Upload course wares, study plans into K-Force portal.*
6.	*Student Record and Database Management*	• *Submit to client student application data (hardcopy) within fourteen (14) days after the beginning of every new Semester.*
7.	*Application and Registration Management*	• *Manage and process applications for admission into the Programs, according to Client's procedure.* • *Manage registrations and orientation of Students at Learning Centres.*
8	*Program Management*	• *Prepare schedules for the Program upon consultation with Client.* • *Manage printing and distribution of examinations papers.*

9.	*Report Management*	• *Manage and administer the conduct of examinations by preparing exam halls for examination, providing invigilators, supplying all materials to be used during examination (except the cover for answer paper) and ensuring compliance of examination rules and regulations.* • *Collate information and prepare reports for submission to the Client on Student number, Student complaint, Customer requirements and any other related matters.*

[7] The programs offered to military personnel are as follows:

(a) Diploma Pengurusan;

(b) Diploma Teknologi Maklumat;

(c) Bachelor of Management;

(d) Bachelor of Information Technology; and

(e) Bachelor of Business Administration.

[8] Pursuant to the agreement, in consideration of the services provided, the defendant shall pay to the plaintiff as project manager an agreed fee of 70% of the gross program fee collected from MINDEF.

THE ACADEMIC COLLABORATION AGREEMENT 2007

[9] The government of Malaysia, represented by MINDEF and Universiti Tun Abdul Razak Sdn Bhd entered into a academic collaboration agreement dated 18 September 2007. The said agreement reiterates the government's desire to provide its army, air force, navy personnel and civilian personnel of MINDEF with an opportunity for educational advancement whilst in service. The courses offered to be conducted through distance learning using a hybrid of face to face and online instructions with face to face element to be conducted at designated learning centers within the designated vicinity and according to agreed time schedule to enable the MINDEF personnel to attend the said courses whilst in service.

[10] The learning centers are listed in schedule I of the agreement. The fees are listed in Schedule II and the programmes to be made available are as described in Schedule III:

(a) Diploma in Management;

(b) Diploma in Information Technology;

(c) Bachelor in Information Technology;

(d) Bachelor of Business Administration;

(e) Diploma in Human Resource Management;

(f) Master of Management; and

(g) Diploma in Internet Security.

THE SECOND MANAGEMENT AGREEMENT 2008 ('SECOND MA')

[11] Upon the expiration of the first agreement, the plaintiff and Universiti Tun Abdul Razak Sdn Bhd executed another management agreement on 1 October 2008 for a further period of two years to continue implementing and managing the K-Force project.

[12] The intention of the parties are described in the recital as follows:

> A. Client has entered into an agreement known as Academic Collaboration Agreement (hereinafter known as the 'Main Agreement') for a period of five years effective form 17 September 2008 till 16 September 2012 with the Ministry of Defence, Malaysia ('Customer') pursuant to which Client provides the Customer's army, air-force, navy and civilian personnel ('Defense Personnel') the means of obtaining educational advancement whilst in service by conducting certain Programs (herein defined) at designated Learning Centers (herein defined) using a hybrid of face to face and online instruction, and a Learning Management System (LMS) and an educational portal ('the K-Force Project').

THE PLAINTIFF'S CLAIM

[13] The plaintiff is a company incorporated under the laws of Malaysia. The defendant is a company incorporated under the laws of Malaysia managing Unitar International University.

[14] It is the contention of the plaintiff that the defendant, without any notice whatsoever and consent of the plaintiff decided to take over the operation of the K-Force project commencing on 1 November 2013. A meeting was held between the parties together with MINDEF on 28 November 2013 and it was agreed as follows:

(a) the defendant to take over the K-Force project during the February 2014 semester even though the agreement will expire on 17 September 2014; and

(b) a committee comprising of representatives of the parties and MINDEF shall be formed to effect the transition process without any interruptions to the learning process schedule of the students already registered.

[15] However, it is contended by the plaintiff that despite agreeing to take over the K-Force project when the February 2014 semester commences, the defendant informed the plaintiff by a letter dated 9 January 2014 that it would proceed to take over from November 2013 instead.

[16] As a result of the defendant's action, the plaintiff purportedly suffered damages. The plaintiff had appointed its subsidiary, Future Learning Corp Sdn Bhd ('FLC') to implement the K-Force project. FLC has employees employed on a full time basis at the designated learning centers. According to the plaintiff the salaries amount to RM731,704.78.

[17] The plaintiff had also, through FLC, rented a larger premises commencing 11 October 2013 for a period of three years with a monthly rental of RM42,000 per month to accommodate the increased number of students. The plaintiff also incurred RM456,000 renovation cost.

[18] As a result of the defendant's action, the plaintiff suffered losses and claims as follows:

(a) a declaration that the defendant is estopped from taking over the K-Force project until the plaintiff and the defendant have agreed on terms in respect of payment of service fees by the defendant to the plaintiff;

(b) an injunction to restrain the defendant whether by themselves or by their agents or servants or otherwise howsoever, from taking over the K-Force project from the plaintiff until the plaintiff and the defendant have agreed upon the terms in respect of the payment of service fees by the defendant to the plaintiff;

(c) specific performance of the agreement dated 1 October 2008; and

(d) general damages and special damages:

(i) losses suffered as a result of renting larger premises: RM630,000;

(ii) outstanding payment on invoices amounting to RM1.304m;

(iii) loss of future income for the 'program pensiswazahan' ie from 2014 onwards based upon 80% of total expected revenue amounting to RM11,350,400;

(iv) annual staff salaries amounting to RM731,504.78;

(v) renovation works amounting to RM292,420;

(vi) outstanding payment to part-time lecturers amounting to RM119,277.35; and

(vii) the plaintiff's and FLC's daily expenses at RM20,000 for 12 months amounting to a total of RM240,000.

[19] The defendant's counterclaim:

(a) the plaintiff had failed and/or refused and/or omitted to carry out its obligations as stipulated in second management agreement. In connection to this, the defendant will refer to and rely upon the contents of para 13.3 of this defence;

(b) in breach of the second management agreement, the plaintiff had appointed a third party (ie FLC) to carry out and perform the operations and management of the K-Force project without the defendant's knowledge and/or authorisation and/or consent;

(c) in absence of the defendant's knowledge and/or consent and/or authorisation, the plaintiff had represented to and/or assured MINDEF that the K-Force project could be utilised in order to carry out certain programmes which were offered by a different educational institution namely Cyberjaya University College of Medical Sciences ('CUCMS'). This has in turn exposed the defendant to sanctions and/or penalties which may be imposed by the Ministry of Education as any such arrangement and/or agreement involving CUCMS must first be approved and/or consented to by the Ministry of Education; and

(d) subsequent to the defendant's take-over of the operations and management of the K-Force project on 1 November 2013, the plaintiff and/or its agents and/or employees and/or workers and/or representatives had made attempts to mislead, inter alia, the students under the K-Force project that the said K-Force project was still being operated and managed by the plaintiff. This has in turn caused confusion and/or misperception on the part of the said students as to the correct party who is currently operating and managing the plaintiff.

[20] The defendant prays for the following reliefs:

(a) an injunction restraining the plaintiff and/or its agents and/or employees and/or representatives from representing and/or stating whether expressly and/or implicitly in any manner and/or under any circumstances whatsoever that the plaintiff and/or its agents and/or employees and/or representatives are currently operating and/or managing the K-Force project;

(b) the plaintiff pays to the defendant general and aggravated damages as a result of the plaintiff's acts of breach and/or default as pleaded in para 22, whereby the said damages are to be assessed by the court; and

(c) the plaintiff pays to the defendant interest at a rate of 5%pa of the sums claimed in para (b) from the date of judgment to the date of full and final settlement.

THE TRIAL

[21] The trial proceeded for four days from 16 June 2014–19 June 2014. There were a total of seven witnesses, that is, four plaintiff's witnesses and three witnesses for the defendant.

THE PLAINTIFF

(a) Dr Mohamad Salmi bin Mohd Sohod ('PW1');

(b) Zuraimy bin Abdul Ghani ('PW2');

(c) Abdul Razak bin Habib ('PW3'); and

(d) Aznin Nur bt Ameran ('PW4').

THE DEFENDANT

(a) Norazlisham bin Mohd Amin ('DW1');

(b) Khairuddin bin Mohd Noor ('DW2'); and

(c) Hj Muhammad Nasri bin Md Hussain ('DW3').

ISSUES FOR DETERMINATION

Whether the plaintiff or the defendant had committed a breach of the second MA

[22] On 28 November 2013 the parties together with MINDEF agreed that the defendant would take over the project in February 2014. However, the parties could not agree with regards to the service fees to be paid by the defendant to the plaintiff. The statement of claim states as follows:

> 12. Untuk menangani kekeliruan ini, Plaintif telah mengaturkan satu mesyuarat untuk membincangkan isu peralihan, yang dihadiri oleh wakil-wakil daripada Plaintif, Defendan dan MINDEF pada 28hb November 2013 di mana pihak-pihak telah bersetuju, tanpa sebarang persetujuan mengenai kadar yuran perkhidmatan yang harus dibayar oleh Defendan kepada Plaintif bahawa:
>
> (i) Defendan hanya akan mengambilalih K-Force pada semester bulan Februari 2014 walhal perjanjian tamat pada 17hb September 2014;

(ii) Satu jawatankuasa yang mengandungi wakili-wakil daripada Plaintif, Defendan dan MINDEF akan ditubuhkan untuk proses peralihan pengurusan projek K-Force tanpa sebarang gangguan kepada proses pembelajaran penuntut-penuntut yang sudah didaftarkan.

[23] It is the plaintiff's pleaded case that the defendant had agreed to take over the K-Force project on the February 2014 semester. However, it is contended by the plaintiff during the trial and through the evidence of PW1 that the defendant breached the second MA by taking over the said project in November 2013 without the agreement of the plaintiff.

[24] By a letter dated 7 October 2013, the defendant notified the plaintiff that the second MA will be extended for a further period of one year commencing 18 September 2013–17 September 2014 applicable for existing K-Force students enrolled before semester September 2013:

In-Fusion Solutions Sdn Bhd

Level 22, Menara Park, Megan Avenue II,

No 12, Jalan Yap Kwan Seng,

50450 Kuala Lumpur.

(Attention: Dr Mohamad Salmi Mohd Sohod, Managing Director)

Dear Dr Salmi,

K-FORCE MANAGEMENT AGREEMENT BETWEEN UNITAR CAPITAL SDN BHD AND IN-FUSION SOLUTION SDN BHD — NOTICE OF EXTENSION OF TERM

We refer to the above matter and our letter dated 2 October 2012 (Ref No: UNITAR/VC/KFORCE/02/12) on the extension of term of the above-mentioned agreement effective for a period of one (1) year commencing from 18th September 2012 to 17th September 2013.

We hereby further extend the term for the K-Force Management Agreement between UNITAR Capital Sdn Bhd and In-Fusion Solutions Sdn Bhd for a further period of one (1) year commencing 18th September 2013 to 17th September 2014 applicable for existing K-Force Management Agreement of UNITAR International University (formerly known as University of Management and Technology) and Universiti Tun Abdul Razak (Campus PINTAR) enrolled before Semester September 2013.

In the event that a new agreement to replace the K-Force Management Agreement is agreed and signed between UNITAR Capital Sdn Bhd and In-Fusion Solutions Sdn Bhd, this extension letter shall cease to take effect immediately on the same date as the effective date of the new agreement.

[25] The extension of the second MA was to be until September 2014 and

will involved students enrolled *before the semester September 2013*. The terms of the extension was accepted by the plaintiff as evidenced below:

> ACKNOWLEDGEMENT & ACCEPTANCE OF TERM EXTENSION
>
> We hereby acknowledge receipt of this Notice of Extension and hereby agree to the extension of the K-Force Management Agreement for a further period of one (1) year commencing 18th September 2012 to 17th September 2013 based on the same terms and conditions as set forth in the K-Force Management Agreement dated 1 October 2008.
>
> Signed by:
>
> Dr Mohamad Salmi Bin Mohd Sohod ...
>
> Managing Director
>
> for IN-FUSION SOLUTION SDN BHD (601042-X) Date: 8 OCTOBER 2013.

[26] However, after the extension was granted it is contended by the plaintiff that the defendant, by a letter dated 31 October 2013, unilaterally decided that it will take over the operation of the K-Force project in November 2013:

> 31 October 2013
>
> Dr Mohamad Salmi bin Mohd Sohod
>
> In-fusion Solution Sdn Bhd
>
> Level 9, Menara Park, Megan Avenue II
>
> No 12, Jalan Yap Kwan Seng
>
> 50450 Kuala Lumpur.
>
> Dr Mohamad Salmi,
>
> NEW DIRECTION OF THE MANAGEMENT OF K-FORCE PROGRAMME
>
> Please refer to the matter below:
>
> 1) Please note the high level meeting between MINDEF and UNITAR on October 17, 2013 discussed on the new direction on the K-Force programme.
>
> 2) With that, please be informed that effective November 1, 2013, students under the K-Force programme in each and every learning centre will deal directly with UNITAR through an education officer elected by MINDEF.

[27] The reason the defendant had to do so as explained by the defendant's witnesses was because the defendant had received complaints from MINDEF regarding the implementation and the management of the K-Force project by

the plaintiff. A high level meeting was conducted on 17 October 2013 with representatives of MINDEF to address the concerns and complaints. Amongst the issues and concerns highlighted:

(a) there were students who had enrolled in the K-Force programs but have not completed their studies;

(b) lack of monitoring and low performance;

(c) lack of academic coordinators at several designated learning centers;

(d) late payments for course leaders and tutors;

(e) lack of proper infrastructure to support teaching and learning; and

(f) lack of software for students enrolled in the information technology courses.

[28] A meeting was then held on 28 October 2013 between the plaintiff and the defendant to address all the problems raised by MINDEF. Even though the decision to take over the program was made by the defendant, the plaintiff had, by its own conduct conceded to the said decision to the takeover. After having been notified of the said decision the plaintiff had engaged with the defendant by having discussions and meetings to ensure a smooth take over. By a letter dated 20 November 2013, the plaintiff proposed to the defendant the following:

(a) Option 1: the plaintiff to continue managing fully the academic operations and student welfare in 2013. The defendant to takeover academic operations of the project starting the new semester 2014;

(b) Option 2: the plaintiff to continue managing fully the academic operations for the next five years and to hand over the project to UNITAR with no compensation; and

(c) Option 3: the defendant to purchase the project from the plaintiff at RM6m.

[29] Subsequently, another meeting was held between the parties on 3 December 2013 where it was agreed by both the plaintiff and the defendant that the defendant will take over the operation of the February 2014 semester from the plaintiff as recorded in the minutes of the meeting:

> 7. Keputusan. Wakil UNITAR yang hadir bersetuju dengan cadangan yang dikemukakan oleh pihak ISSB di mana UNITAR akan mengambilalih pengoperasian sepenuhnya pada Semester Feb 2014.

[30] PW1 had attended the meeting together with his officer, Hamid bin Othman who recorded the minutes of the meeting. It is recorded in the

minutes as follows:

> 6d. Dr Mohamad Salmi memohon agar peralihan pengurusan ini dilanjutkan sehingga tamat *Semester September 2013* yang *akan berakhir pada bulan Januari 2014. Selepas itu barulah pihak UNITAR akan menguruskan pengurusan program K-Force.*

[31] By the letter dated 9 January 2014 (p 78 A) the defendant informed the plaintiff:

(a) the requirement and instruction from MINDEF, the client, for the programmes to be taken over and managed directly by UNITAR International University; and

(b) the involvement and operating cost to be incurred by the plaintiff will be minimal as it will be wholly borne by the university.

[32] This court scrutinised the terms and conditions of the second MA, the meetings/negotiations between the parties, the written documents as well as correspondences in order to determine whether there was a breach of the agreement by the defendant. Clause 15.5.1 of the second MA stipulates:

> This agreement represents the totality of the terms and understanding between the parties hereto and the Parties declare that save and except where the parties have expressly signed any further or other document from this date onwards, evidencing any agreement between them whether by themselves or through their solicitors, there are no further or other terms ,oral or otherwise which are applicable or binding on the parties in respect of the terms herein.

[33] The statement of claim must encapsulate the basis of the plaintiff's claim against the defendant. The breach as envisaged by the plaintiff's pleadings is not the breach of the second MA but the breach of the agreement reached by the parties pursuant to the letter dated 9 January 2014. The plaintiff's pleaded claim is premised on the takeover of the operations and management of the K-Force project by the defendant in November 2013 as stated in paras 13–14 of the statement of claim:

> 13. Walaupun *defendan telah berjanji* untuk mengambilalih projek K Force pada semester *bulan Februari 2014*, defendan telah memungkiri perjanjian dan memberitahu plaintif, melalui surat bertarikh 9hb Januari 2014 tanpa sebarang persetujuan daripada plaintiff bahawa defendan akan meneruskan dengan pengambilalihan projek K-Force *mulai daripada bulan November 2013*.
>
> 14. Akibat tindakan defendan, plaintif telah mengalami gantirugi khas ...

[34] The evidence of the plaintiff's witnesses in particular PW1 however seems to be otherwise. The plaintiff's witnesses gave evidence that notwithstanding the meetings and negotiations as well as the agreement

between the parties that had taken place, the defendant had breached the second MA by refusing to allow the plaintiff to manage and operate the K-Force project.

[35] Nowhere is it stated in the pleadings that the defendant had breached the second MA or expressly stating or identifying the relevant clause or clauses that the defendant had purportedly breached the agreement. The parties are bound by their pleadings. The court is not entitled to decide a suit on a matter which is not pleaded and the trial of the suit is confined to the pleadings filed. The Federal Court in *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22; [1968] 1 LNS 8 referred to the following cases to emphasise on the importance of pleadings:

> In *Thomson v Birkley* (1883) 47 LTR p 700 Watkin Williams J says:
>
> The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues.
>
> In *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 413 Cotton LJ says:
>
> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.
>
> In *Thorp v Holdsworth* (1876) Ch 637 at p 639 Jessel Mr says:
>
> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of R XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

[36] Justice Abdul Malik Ishak in the Court of Appeal judgment in the case of *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2014] 5 CLJ 533 explained the importance of pleadings:

> Since time immemorial, pleadings play an important role in civil litigation. What is pleaded will no doubt serve to define the parameters of the case. The issues of facts and questions of law will be identified and they in turn will be adjudicated between the parties during trial. It gives to a large extent a distinct and clear notice of the case that will be adjudicated and this will prevent either party from being taken by surprise during trial. The court too will benefit from the pleaded case and could easily identify the issues for determination.

[37] The purpose of pleadings is to define the issues and thereby to inform the parties in advance of the case so as to enable them to take steps to prepare and deal with it.

[38] It is settled principle that when more than one document is involved in a transaction, the court shall construe these documents together to ascertain the intention of the parties (see *Glamour Green Sdn Bhd v AmBank Bhd & Anor Appeal* [2007] 3 CLJ 413).

[39] The court can take into consideration the factual matrix that forms the background to the contract and is not confined to merely examine the formal contract (see *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243; [1983] 2 CLJ 187; [1983] CLJ (Rep) 186).

[40] Lord Clyde in *Bank of Credit and Commerce International SA v Munawar Ali* [2002] 1 AC 251 put the approach in this way:

> The knowledge reasonably available to them (the parties to contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. In the instance case the plaintiff knew and had in fact agreed that the defendant would be taking over the K-Force project from February 2014. However, the parties failed to come to an agreement with regards to the service fees.

[41] The Federal Court in *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577; [1995] 2 CLJ 23 held:

> For the purposes of construction of contracts the intention of the parties is the meaning of the words they have used. Hence, the question to be answered always is 'what is the meaning of what the parties have said' and not 'what did the parties mean to say'.

[42] In the instant case based on the documentary and oral evidence, the plaintiff had accepted the decision of the defendant to take over the K-Force programmes. This court has considered the factual matrix of the case with regards to the agreement and I am of the considered view that no evidence was adduced by the plaintiff to prove that the defendant had breached the second MA.

FUTURE LEARNING CORPORATION ('FLC')

[43] FLC is a company owned and managed by Dr Salmi himself. According to the plaintiff's pleaded case, FLC was appointed by the plaintiff to operate

and manage the K-Force project on behalf of the plaintiff. However, cl 15.9.1 of the second MA expressly provides that any assignment must be done with the consent of the other party,

> This agreement and all its rights and obligations hereunder are personal to the parties here to and each party hereto shall not assign or attempt to assign any such rights or obligations to any third party without consent of the other party.

[44] There is evidence that the rights and obligations have been assigned to FLC with the consent of the defendant. Learned counsel for the plaintiff argued that the defendant was aware of FLC's involvement. A booklet entitled '1-Dekad K-Force' produced by the plaintiff mentioned FLC and a letter issued by MINDEF was also copied to FLC.

[45] No other evidence was adduced by the plaintiff that they had informed the defendant and that the defendant had consented as required by the above mentioned cl 15.9.1.

[46] PW1 himself confirmed in evidence that the MA is between the plaintiff and the defendant:

> Q: Would you agree with me the terms contained in the agreement constitute the entire agreement between the parties?
>
> A: Yes.

[47] The plaintiff and FLC are two separate entities and based on the terms of the second MA, there is no privity of contract between the defendant and FLC. The second MA is between the plaintiff and the defendant. FLC is clearly not a party to the agreement and thus cannot enforce it. The relationship between the plaintiff and the defendant is based on all the said agreements. The parties are therefore bound by the express terms of the said agreements.

[48] The contractual relationship of the parties are governed by the terms of the agreement and as such the plaintiff cannot invoke and interpret the provisions of all the agreements according to their whims and fancies. In *Bank of Credit and Commerce International SA v Munawar Ali* [2002] 1 AC 251, Lord Bingham of Cornhill said at p 259:

> In construing a contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used in their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified (see also *Investors Compensation Scheme Ltd v West Bromwich*

Building Society [1998] 1 WLR 896 at pp 912–913).

[49] Therefore, based on the reasons stated above any claim for damages by FLC pursuant to the second MA would inevitably fail.

DAMAGES

[50] The Court of Appeal in *Lee Sau Kong v Leow Cheng Chiang* [1961] 1 MLJ 17; [1960] 1 LNS 56 where it quoted with approval the judgment of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 as follows:

> The plaintiffs must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw the at the head of the court, saying:
>
> This is what I have lost; I ask you to give me these damages. They have to prove it.

[51] It is expressly stipulated in the second MA that the plaintiff and the defendant would not be liable to one another of any financial compensation and/or damages arising out of the breach of the said contract. Clause 14.1.1 second MA provides:

> Except as set forth in clauses 6.2.2 and 14.2 of this agreement, neither party will be liable to the other for either special, indirect, consequential or incidental losses or damages of any kind or nature whatsoever, including but not limited to lost profits, lost records and data, lost savings, lost of use of facility or equipment, loss by reason of records facility shutdown or non-operation or increased expense of operations, or other costs, charges, penalties, or liquidated damages, regardless of whether arising from breach of contract, warranty, tort, strict liability or otherwise, even if advised of the possibility of such loss or damage or if such loss or damage could have been reasonably foreseen.

[52] Edgar Joseph Jr J in the case of *Popular Industries Ltd v Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 (HC) opined:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right.
>
> Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v Williams* [1830] 1 B & Ad 415. And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. See, for example, *Dixon v Deveridge* [1825] 2 C & P 109 and *Twyman v Knowles* [1853] 13 CB 222.
>
> On the question of the quality of evidence expected of a plaintiff it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422, at p 438

namely, 'where precise evidence is obtainable, the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] WLR 1731 (CA) in which the plaintiff claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given (see para 345 *McGregor on Damages*, 15th Ed).

[53] The plaintiff failed to adduce sufficient evidence to prove that they had suffered or experienced financial loss. The plaintiff had relied on the letter dated 9 January 2014 sent by the defendant to the plaintiff proposing an arrangement or settlement. The proposal was not accepted by the plaintiff. PW4 had stated in her WS that the loss of income is RM9,124,500 but did not explain how the said sum was derived or calculated. The claim for loss of income is based on the plaintiff's belief that the MA would be extended until 2017.

RENOVATION AND RENTAL EXPENSES

[54] The MA is between the plaintiff and the defendant. Therefore the defendant cannot be held liable for any expenses or losses incurred by FLC. Only a party to a contract is entitled to claim for loss or damages.

CLAIM FOR UNPAID INVOICES

[55] The plaintiff did not plead and particularise in the statement of claim the outstanding invoices. Furthermore, the letter from the defendant dated 7 October 2013 expressly stated that the second MA was extended for a further period of one year commencing from 18 September 2013–17 September 2014 for students enrolled before the September 2013 semester. The invoices tendered however are in respect of students who had enrolled for the September 2013 semester.

SPECIFIC PERFORMANCE

[56] Specific performance is a decree issued by the court directing the defaulting party to do that which he has promised to do. It is an equitable remedy and it shows that equity, at times, acts in personam. It is a decree that will ultimately do justice between the parties (*Ng Lay Choo Marion v Lok Lai*

Oi [1995] 3 SLR 221 at p 228). The usual remedy for breach of contract is the recovery of damages. It is the duty of the plaintiff to show that the loss in respect of the claims and the damages was caused by the defendants' wrong. The damages to be recoverable must not be too remote (*Popular Industries Ltd v Eastern Garment Manufacturing Co Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 (HC)).

[57] The burden is on the plaintiff to show that the loss was due to the defendant's action. In the instant case, the defendant had decided not to extend the MA. The defendant therefore did not breach the MA. Furthermore, in her evidence, PW4 had stated there is no longer a business relationship in existence between the plaintiff and the defendant.

CONCLUSION

[58] I have considered the evidence adduced in its entirety together with the submissions of both counsels as well as authorities tendered in support of their respective cases. I am satisfied that the plaintiff have failed to prove its claim against the defendant on a balance of probabilities. Therefore, the plaintiff's claim against the defendant is dismissed with cost of RM30,000.

COUNTERCLAIM

[59] The defendant's counterclaim is premised on the MA. It is contended in the counterclaim that the plaintiff had breached the MA by appointing FLC to operate and manage the K-Force project without the consent of the defendant.

[60] Having considered the above facts, evidence and submissions by both parties, the court found that the defendant had established its counterclaim against the plaintiff on a balance of probabilities. By appointing FLC without the knowledge and consent of the defendant as required by the terms of the second MA, the plaintiff has breached the agreement.

[61] However with regard to the claim for damages, the defendant is only entitled to an award of nominal damages at RM10,000 for want of proof. The defendant failed to adduce any evidence during the trial to quantify it damages and in such circumstances, the court could not even form a basis of a speculative inference measuring the extent of its damages for general and aggravated damages.

The plaintiff's claim dismissed with costs of RM30,000 and defendant's counterclaim allowed in part.

Reported by Dzulqarnain Ab Fatar